FOR ARGUMENT

No. 78-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF ILLINOIS,

Petitioner

vs.

JOHN M. VITALE,

Respondent

On Writ of Certiorari to the Supreme Court of the State of Illinois

REPLY BRIEF AND ARGUMENT FOR PETITIONER

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Pursuant to the order of this Court entered on October 1, 1979 granting the Writ of Certiorari in the instant case, your Petitioner, the People of the State of Illinois, timely filed the brief and argument for Petitioner. Respondent John Vitale, has now filed a brief contesting the position taken by your Petitioner. Therefore, the People of the State of Illinois herewith submit brief reply to the Respondent.

STATEMENT OF THE CASE

At pages four through seven of the People's brief your Petitioner sought to give a brief summary of the case beginning with the incident in which two young children were struck and killed by the automobile of John Vitale, and indicating the course of the case until its present setting for consideration by this Honorable Court. In so doing, the People included a one paragraph summary of a police report concerning the circumstances of the striking of the children; that report being part of the record in all Illinois courts of review below. It appears that, for the first time, Respondent now takes exception to the presence of this report and to any mention of it by the People of the State of Illinois. We feel compelled to say here that the extended references in Respondent's brief to alleged bad faith or prejudicial conduct on the part of the People are out of place in this Court, and that even more out of place are the comments in the same section relating to alleged predisposition to decide the case on the part of the Honorable Robert Underwood, Justice of the Supreme Court of the State of Illinois.

Be that as it may, the facts in this case remain as set forth in the People's brief. John Vitale drove his automobile into an intersection where he struck and killed two children. He was ticketed by an officer at the scene for failing to reduce speed to avoid an accident and was convicted and fined on the basis of that traffic citation. The proceeding brought against him for two charges of involuntary manslaughter arising out of the deaths of the children was dismissed on double jeopardy grounds and that dismissal was eventually affirmed by the Supreme Court of the State of Illinois. Therefore, following certification by the Illinois court that its decision was based upon an interpretation of the Constitution of the United States, the case has come before this Court for ultimate determination on the Writ of Certiorari.

ARGUMENT

I.

THE TWO OFFENSES HERE WERE NOT THE SAME OFFENSE FOR PURPOSES OF THE DOUBLE JEOPERDY CONCEPT EMBODIED IN THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The issues in this case remain as stated in the People's initial brief: (1) were the two offenses here under consideration the "same" offense for double jeoperdy purposes, and (2) is failing to reduce speed to avoid an accident a lesser included offense of involuntary manslaughter as those offenses are defined under Illinois law?

As to the first of these, it is clear that offenses are seperate and distinct and not the same for double jeoperdy purposes when each involves an element of proof which the other does not. *Jeffers* v. *United States,* 432 U.S. 137 (1977); *Blockburger* v. *United States,* 284 U.S. 299 (1934). This is the concept known commonly as the "same evidence test". See *Ashe* v. *Swenson,* 397 U.S. 436, 463 (1969). The question is not as to the elements of proof in the particular case, but rather the elements required by the individual statutes involved. *Brown* v. *Ohio,* 432 U.S. 161 (1977). Contrary to the position taken in the brief for Respondent, there is no prohibition against trial and/or punishment for more than one offense arising out of a single act or series of acts as long as the offenses are seperate and distinct and not the same offense for purposes of double jeoperdy. *Pereira* v. *United States,* 347 U.S. 1 (1954); *Gavieres* v. *United States,* 220 U.S. 338 (1911).

This Court has held to these same principles in its action of November 13, 1979, in dismissing for want of a substantial federal question case No. 79-5506, *Brintley* v. *Michigan,* ____ U.S.____, 26 Cr.L. 4113. The question presented there was

whether Michigan statutory provisions making separate offenses out of the action of committing a particular felony and committing that same felony while armed offended double jeoperdy. Once more this Court held that the test is that set forth in *Blockburger* v. *United States,* 284 U.S. 299 (1934); that test being whether the offenses are the "same offense". This Court again finds that nothing prevents legislatures of the individual States from enacting such legislation as long as each offense involves proof which the other does not. Certainly the conduct of using a firearm to commit a felony involves the same act or series of acts. Clearly, however, this does not preclude separate prosecutions under the concept of double jeoperdy.

As pointed out by the court in *Virgin Islands* v. *Smith,* 558 F.2d 691 (3rd Cir. 1977), not only may statutes enumerate different elements thus showing that more than one offense arises from particular conduct, but the nature of those elements may indicate that the legislature intended the offenses to be seperate and distinct. Here, a reading of the two Illinois statutes involved, setting forth the elements of the crime of involuntary manslaughter and the traffic offense of failing to reduce speed to avoid an accident, shows that they do not of necessity involve the same elements and that the legislature never contemplated them as the same offense. Failure to reduce speed does not involve any element of death or even of striking any person, while involuntary manslaughter of necessity involves a death but involves no element concerning the operation of a motor vehicle. (See, Petitioner's Brief, Pp. 17-18).

Cases such as *Benton* v. *Maryland,* 395 U.S. 784 (1969), cited by Respondent, are not here in point. The question there concerned whether the defendant could be convicted at a second trial of an offense for which he had been acquitted at a first trial, when the case was overturned on review due to the holding that Maryland's system of jury selection was Constitutionally improper. That such a conviction would be

forbidden by the concept of double jeoperdy, has no relivence to the present question before this Court.

Therefore, once more we urge this Court that these offenses are not the same offense for double jeoperdy purposes.

II.

THE TRAFFIC OFFENSE IS NOT A LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER UNDER ILLINOIS LAW AND THUS NOT THE SAME OFFENSE FOR DOUBLE JEOPERDY PURPOSES.

The Illinois Supreme Court's majority below held that the traffic offense of failing to reduce speed to avoid an accident is a lesser included offense of involuntary manslaughter. Mr. Justice Underwood and Mr. Justice Ryan strongly dissented pointing out that this could not be the case considering the statutory elements of the two offenses involved. The People have argued at length in their initial brief that the traffic offense is not a lesser included offense of involuntary manslaughter as those offenses are defined in Illinois. (Petitioner's Brief, PP. 15-19) Once more we note the traditional test which is that in order to constitute a lesser included offense situation, it must be true of necessity that one cannot prove the so-called greater offense without also proving the lesser. *Brown* v. *Ohio,* 432 U.S. 161 (1977); *Virgin Islands* v. *Acquino,* 278 F.2d 540 (3rd Cir., 1967). Under this test it is clear that proof of the offense of involuntary manslaughter may easily be made without reference to an automobile at all. Moreover, even proof of that offense involving the operation of an automobile may well have no element of failing to reduce speed contained within it. Similarly, the offense which is characterized as a lesser included offense, failing to reduce speed, involves no element of death or even necessarily of collision. We submit that had the legislature of Illinois intended such a traffic charge to be a lesser included offense, they would have so indicated by the elements of the

offense as set out in the statute. On the contrary here, however, the elements indicate that seperate offenses were conceived and defined by the legislators. Therefore, the dissenting opinion of the Supreme Court below is the correct interpretation and should be adopted by this Court.

The Respondent contends that this Court is bound by the majority opinion of the Illinois Supreme Court below and may not consider the question of lesser included offenses. Were this true, the rule in *Brown* v. *Ohio,* 432 U.S. 161 (1977) would govern here. However, in *Brown* the concept of joyriding as a lesser included offense of automobile theft under Ohio law came to this Court undisputed. Here there is a dispute in the highest court of Illinois as to whether the traffic offense is a lesser included offense. The question comes before this Court in a different posture than it did in *Brown,* and in order to determine whether double jeoperdy forbids the second prosecution in the instant case it is necessary that this Court resolve the issue concerning whether the traffic offense is a lesser included offense of involuntary manslaughter. The quote from *Brown* v. *Ohio* at page five of Respondent's brief is out of context and does not indicate that the Supreme Court of the United States is bound here by the pronouncment of the majority of the Illinois Supreme Court below.

It should be noted that it is not clear that the proofs would be the same in a trial for involuntary manslaughter as they were in the trial of the traffic case. In fact, we do not know what proofs were presented in the traffic case. The assertions made in the brief for the Respondent that John Vitale testified and was subject to cross-examination, or as to what proofs may have been presented, is completely beyond the record before this Court. (Respondent's Brief, P. 6) However, even though decrying the mention of the police report herein, Respondent seems to concede in its brief that numerous incidents were here involved concerning multiple driving violations on the part of John Vitale. (Respondent's Brief, P. 7)

Be that as it may, we are not here concerned with what the People below might have done or hypothetical questions as to how many traffic violations Vitale might have been charged with. We are concerned here with one question; whether it is a violation of the concept of double jeoperdy as set out in Amendment V of the Constitution of the United States to try Vitale for involuntary manslaughter in the deaths of the children although he paid his traffic fine for failing to reduce speed to avoid an accident. We submit that the answer to this question is that no violation of the United States Constitution is involved and, therefore, the case should be remanded following the overturning of the result reached in the Illinois courts below.

CONCLUSION

For the reasons set forth above, the People of the State of Illinois respectfully request that this Honorable Court reverse the judgment of the Supreme Court of Illinois herein reviewed and remand the case to that court with directions to return it to the Circuit Court of Cook County for further, proper proceedings on the charges of involuntary manslaughter.

Respectfully submitted,

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